No. 98-1039

In The

Supreme Court of the United States

October Term, 1998

26 TIDELAND AND UPLAND PRIVATE PROPERTY OWNERS ("UPOW"),

Petitioners,

vs.

UNITED STATES OF AMERICA, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

UPOW'S REPLY TO BRIEFS IN OPPOSITION

JAMES MARTIN JOHNSON
Counsel of Record

Attorney at Law
1110 S. Capitol Way
Suite 225
Olympia, WA 98501
(360) 357-3104

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

1. The United States Respondent erroneously argues the taking of private property ordered by the Ninth Circuit is required by this Court's prior decision 1

2. The Ninth Circuit conflicts with other circuits' treaty decisions because it disregards the very reason for the treaties at issue 1

3. The treaties provided reservations to fulfill any shellfish need 2

4. The equal footing doctrine requires the United States to hold tidelands in trust for the states and convey all such interests at statehood 3

5. This Court must supervise the Ninth Circuit to assure compliance with its earlier decision in this case ... 4

CONCLUSION 9

TABLE OF AUTHORITIES

Page

CASES

Confederated Tribes of Chehalis Reservation v. Johnson, 958 P.2d 260 (Wash. 1998) 7

Lac Courtes Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin, 760 F.2d 177 (7th Cir. 1985) 2

Mille Lacs Band of Chippewa Indians v. Minnesota, 124 F.3d 904 (8th Cir. 1997) 2

Mille Lacs Band of Chippewa Indians v. Minnesota, 861 F. Supp. 784 (D. Minn. 1994) 2

Nollan v. California Coastal Commission, 483 U.S. 825 (1987) 1

Sequim Bay Canning Co. v. Bugge, 94 Pac. 922 (Wash. 1908) 1

Shively v. Bowlby, 152 U.S. 1 (1894) 3

United States v. Holt State Bank, 270 U.S. 49 (1926) ...3, 4

United States v. Winans, 198 U.S. 371 (1905) 4

Utah Div. of State Lands v. United States, 482 U.S. 193 (1987) 4

Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979) 1, 3, 5, 6

STATUTES & REGULATIONS

Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 7

Treaty with Nisqualli, 10 Stat. 1132 (1854) 2

UPOW'S REPLY TO BRIEFS IN OPPOSITION

1. The United States Respondent erroneously argues the taking of private property ordered by the Ninth Circuit is required by this Court's prior decision. "Private landowner petitioners . . . claim is foreclosed by this Court's decision." (U.S. Brief, p. 15). The Ninth Circuit actually is in conflict with the decisions of this Court and of other circuits which have considered a conflict between treaty rights and private property rights.

The decision below is an unprecedented taking of the private property of the 65,000 landowners represented by UPOW in two ways. First, it takes and transfers to tribes an uncontrolled (by the landowner) access to private real property. (See *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).[1] Second, the Ninth Circuit construes the treaty to allow the take by tribal members of 50% of the clams which are also the property of the owners, *see Sequim Bay Canning Co. v. Bugge*, 94 Pac. 922 (Wash. 1908). Each is a taking of private property to satisfy an (alleged) federal treaty obligation.

2. The Ninth Circuit conflicts with other circuits' treaty decisions because it disregards the very reason for the treaties at issue. This Court stated that purpose: "To extinguish the last group of conflicting claims to lands . . . The Indians relinquished their interest in most of the Territory in exchange for monetary payment (and reservations) . . . " *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 661 (1979).

Other circuits have recognized the same treaty intent reflected in similar treaty language, especially the first article of nearly every land cession treaty. Each such treaty article, usually the first, was a similar "quit claim" of tribal interests in the lands so that settlers could occupy and own lands.

---

[1] While access through the residential uplands is somewhat limited, tribal water access is totally unrestricted.

Accordingly, other circuit court decisions have uniformly recognized that usufructuary rights of the tribes do *not* extend to private lands: "The ceded territories were ceded for the purpose of eventual settlement . . . that settlement by going into private hands simply should not be subject to the reserved usufructuary rights." *Lac Courtes Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, 760 F.2d 177, 182 (7th Cir. 1985).

The Eighth Circuit approved similar conclusions: "[T]reaty rights do not include a right of access, Band members may exercise their rights only on public lands and private lands open to public hunting, fishing and gathering." *Mille Lacs Band of Chippewa Indians v. Minnesota*, 124 F.3d 904, 933 (8th Cir. 1997) affirming district court decree that "exercise of the 1837 usufructuary rights should be limited to lands in the ceded territory that are not privately owned. . . . " *Mille Lacs Band of Chippewa Indians v. Minnesota*, 861 F. Supp. 784, 836 (D. Minn. 1994).

3. The treaties provided reservations to fulfill any shellfish need. Each of the treaties here established reservations for the Indians (part of the consideration for the extinguishment of Indian claims to lands as noted in this Court's prior decision quoted above). Generally, the reservations were selected to include or have adjacent shellfish beds. (*See* Treaties in Petitioners' Appendix, pp. 169-203.)

This selection of reservations to provide direct access to shellfish beds further reflects the treaty understanding and intent that the treaty could be fulfilled, while avoiding conflicts caused by the tribes entering the settlers lands. Other articles of the treaties required permission of settlers for Indians to reside on lands. (*See, e.g.*, Treaty with Nisqualli, 10 Stat. 1132 (1854), Art. 2). The Indians also pledged to "commit no depredations on the property of such citizens." *Id.*, Art. 3. The same article here provided for a hunting privilege only on "open and unclaimed lands."

The treaty intent was to clear Indian claims to lands, while giving them reservation homes to allow settlement and

private ownership and avoid conflict between Indians and settlers. As this Court noted: "By thus separating the Indians from the settlers, it was hoped that friction could be minimized." *Fishing Vessel*, 443 U.S. at 699. This intent was faithfully implemented in the other circuits' treaty decisions cited above which conflict with the Ninth Circuit here.

United States Exhibit 181 showed that there are 113 miles of shellfish tidelands adjacent to the Indians' reservations (as well as over 54 additional miles of other federal ownership). The Ninth Circuit never considers nor explains why these treaty-provided shellfish tidelands and additional U.S. tidelands are not sufficient for any tribal shellfish needs. Also, *see* Judge Beezer's concurrence: "A tribal share of shellfish could come from reservation land, government land or private tidelands acquired by the tribe." Pet. App., p. 46.

If there is a treaty obligation beyond reservation tidelands, the United States might reasonably be expected to make *all* of its tidelands available to tribal use in order to avoid conflicts with private owners as the treaties intended. The United States Respondent buries this issue in misleading fn. 14, which notes that agreements have been reached to allow tribal shellfishing on *some* federal lands (citing one such agreement) while not rebutting the more general proposition that absent such agreement, tribes are excluded from many federal beaches (especially military bases). The United States blithely asserts that these federal beaches "in any event are not at issue in this lawsuit." This U.S. theory presumably excludes the reservation beaches which are also usually owned by the United States. The treaties have no such exemption for tidelands which should be used *first*.

4. The equal footing doctrine requires the United States to hold tidelands in trust for the states and convey all such interests at statehood. Only where some "international duty or public exigency" dictates to the contrary *and* clear and unequivocal language is utilized could this United States' constitutional trust duty be breached. *Shively v. Bowlby*, 152 U.S. 1, 48 (1894); *United States v. Holt State*

Bank, 270 U.S. 49, 55 (1926). *See, also, Utah Div. of State Lands v. United States*, 482 U.S. 193, 202 (1987).

Here, as the constitution requires, the United States did transfer the tidelands title to the state with the express exception *only* of some Indian reservations. As the U.S. Constitution allows, the State ultimately chose to dispose of many of the tidelands to private ownership. The *only* value of many of these tidelands is for the shellfish.

These tidelands and 50% of the clams have now been taken by the United States to satisfy a supposed treaty obligation which could and should be satisfied on the United States' remaining tidelands. It is sophistry to suggest, as do the Respondents, that the private property taking here is similar to a proscriptive right to access a navigable waterway in which a fishing right may be exercised as in *United States v. Winans*, 198 U.S. 371 (1905). Note, too, that the courts below held the Yakama treaty *fishing* right at issue in *Winans* did *not* include shellfish. Pet. App. 88. "Fish" does not necessarily include shellfish.[2]

5. This Court must supervise the Ninth Circuit to assure compliance with its earlier decision in this case. Both Respondents seek to avoid confronting the impact of this Court's "moderate living" doctrine in the previous remand of this case. Indeed, they claim this Court "affirmed" rather than vacating and remanding (U.S. Br. at 6). This Court emphasized:

> It bears repeating, however, that the 50% figure imposes a maximum but not a minimum allocation . . . . Indian treaty rights . . . secures to much as, but not more than, is necessary to provide the Indians with a livelihood – that is to say, a moderate living.

---

[2] As noted in our Petition, the record shows the term "fish" as explained to all these Indians through the Chinook jargon was different from "shellfish" – and the latter was *not* a subset of the former as in English. 26 Tideland and Upland Owners UPOW Petition, p. 12.

> Accordingly, while the maximum possible allocation to the Indians is fixed at 50% [footnote omitted], the minimum is not; the later will, upon proper submissions to the District Court, be modified in response to changing circumstances.

Fishing Vessel, 443 U.S. at 686-687.

The district court twice refused to apply this Court's decision: "[T]he court *declines* to apply the Moderate Living Doctrine to these facts." Pet. App. 85, 86.

The Circuit Court also ducked the remand issue, by affirming the district court's holding that the tribes "lag significantly behind other residents of the State of Washington in their overall standard of living." Pet. App. 33 (quoted in U.S. Respondent Brief, p. 14).

This Court's analysis did not envision any such comparison of how the tribal population of Washington fares generally with regards to the rest of the population. Indeed, many of the Washington tribes considered by the court below in this comparison are *non-treaty* tribes. One study relied on by the district court in support of this finding was over 20 years old. (Office of Program Research, The Legal Relationship Between Washington State and Its Reservation-Based Indian Tribes. Washington House of Representatives (Olympia: 1977), p. 21.)

The evidence before the court actually showed most of *these treaty tribes* had a "moderate income" equalling or even exceeding that of their neighbors:

TRIBAL HOUSEHOLD PRIVATE AND COLLECTIVE INCOME,[3] NOT INCLUDING CASINO REVENUES[4]

TRIBE	AVERAGE HOUSE-HOLD PRIVATE INCOME	TRIBAL AVERAGE TOTAL HOUSE-HOLD INCOME	NON-INDIAN MODERATE LIVING 50-80% OF MEDIAN COUNTY INCOME
JAMESTOWN	$ 40,000	$ 54,619	$17,084-$27,334
LOWER ELWHA	$ 15,218	$ 21,456	$12,717-$20,347
LUMMI	$ 27,890	$ 34,711	$13,800-$22,079
MAKAH	$ 21,147	$ 33,499	$12,717-$20,347
MUCKLESHOOT	$ 20,801	$ 51,816	$18,090-$28,994
NISQUALLY	$ 22,115	$ 44,787	$15,488-$24,781
NOOKSACK	$ 15,495	$ 22,237	$14,184-$22,694
PORT GAMBLE	$ 31,889	$ 43,585	$16,024-$25,638
PUYALLUP	$ 27,830	$ 37,518	$15,206-$24,330
SKOKOMISH	$ 16,971	$ 20,045	$13,152-$21,043
SQUAXIN IS.	$ 19,484	$ 32,578	$13,152-$21,043
SUQUAMISH	$ 26,495	$ 36,889	$16,022-$25,634

[3] *Moderate Living And Pacific Northwest Indian Tribes*, October 1993, and *Assessing Moderate Living For The Makah and Yakama Indian Tribes*, February 1994, Tables CI-2, ML-2, and PI-1.

[4] "Moderate income" definition is from the Housing and Community Development Act of 1974, at 42 U.S.C. § 5302(20)(A), the federal statute in effect when *Fishing Vessel* was rendered.

SWINOMISH	$ 25,707	$ 53,441	$14,195-$22,711
TULALIP	$ 27,754	$ 42,900	$18,324-$29,318
UPPER SKAGIT	$ 13,199	$ 25,423	$14,195-$22,712

This was true before consideration of the tribal gambling casinos. Of the Respondent treaty tribes in this case, all but one has a Compact to operate a gambling casino under the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701-2721.

The testimony accompanying the casino information established that because of affirmative hiring practices by tribal casinos, any member is entitled to casino employment. Many reasonably choose such more lucrative and comfortable employment over fishing as a profession.

The tribes lost an effort to block updated casino information. *See Confederated Tribes of Chehalis Reservation v. Johnson*[5], 958 P.2d 260 (Wash. 1998). These public records supplemented earlier casino gambling records to show that tribal revenues from casinos alone allowed many of the tribes to far exceed a "moderate income" as compared with other residents in their county.

Still, the Circuit Court dismissed the effect of this Court's decision: "Even if we were to consider Tribal income from casino operations – as the Appellant ask us to do – we would not be left with a 'definite and firm conviction' that the district court's findings were erroneous." Pet. App. 33, n. 11. Here are the casino figures the Circuit Court had in reaching this conclusion.

---

[5] Appellants in that case included the Upper Skagit Indian Tribe, the Swinomish Indian Tribal Community, and the Squaxin Island Tribe. These tribes are Respondents herein.

TABLE 2: TRIBAL CASINO NET WIN (CALCULATED FROM PUBLIC RECORD OF COMMUNITY CONTRIBUTION, ADDENDUM 3-4)

Tribe	Year	Net Win	No. of Tribal House-holds	Net Win per House-hold
Jamestown Klallam Tribe	1995	7,990,650	62	128,881
Muckleshoot Tribe	1995	26,379,750	134	196,864
Nooksack Tribe	1995	6,236,650	207	30,129
Squaxin Island Tribe	1996	7,821,000	116	67,422
Suquamish Tribe	1996	15,000,000	198	75,758
Swinomish Tribe	1995	13,959,600	111	125,762
Tulalip Tribe	1995	24,795,150	502	49,392
Upper Skagit Tribe	1996	17,377,400	113	153,782

UPOW Ninth Circuit Reply Brief.

The table on p. 6-7 gives comparable "moderate" income for non-Indian residents. Though the years are different, many of these tribes' casino revenues obviously far exceeded the "moderate living."

It is clear that, unless supervised by this Court, the Ninth Circuit Court will not comply with or apply the previous rulings in this case as relates to the "moderate living" standard.

CONCLUSION

For the above reasons, the Petition of 26 Tideland and Upland Private Property Owners (UPOW) should be granted.

Respectfully submitted,

JAMES MARTIN JOHNSON
Counsel of Record
1110 S. Capitol Way
Suite 225
Olympia, WA 98501
(360) 357-3104
Counsel for Petitioners 26 Tideland and Upland Private Property Owners (UPOW)